

The Overseas Operations (Service Personnel and Veterans) Bill Briefing to House of Commons, April 2021

Who are we?

Freedom from Torture is dedicated to healing and protecting people who have survived torture. We provide therapies to improve physical and mental health, we medically document torture, and we provide legal and welfare help. We expose torture globally, we fight to hold torturing states to account and we campaign for fairer treatment of torture survivors in the UK.

Survivors Speak OUT is the UK's only torture survivor-led activist network and is actively engaged in speaking out against torture and its impacts. Set up by survivors of torture, for survivors of torture, we use our first-hand experience to speak with authority for the rights of torture survivors.

Summary

Freedom from Torture and Survivors Speak OUT oppose the proposal for a presumption against prosecution for any offences involving torture or other ill-treatment on the bases this:

- Risks creating impunity for torture in breach of the UK's obligations under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), the European Convention on Human Rights (ECHR), and customary international law;
- Further undermines the absolute prohibition on torture by encouraging other states to reproduce similar measures.

At a minimum, torture and other serious international crimes should be excluded from the presumption against prosecution.

Breach of obligations under CAT / customary international law

The bill cannot be considered without full recognition of the strength and significance of the prohibition on torture and other ill-treatment, and of the obligations that flow from it.

1. The prohibition against torture is recognised as a norm of *jus cogens* (or a “peremptory norm”) and cannot be derogated from even in times of war or public emergency.
2. The prohibition contained in Article 3 of the ECHR pertains to torture, inhuman treatment and punishment, and degrading treatment and punishment without distinction.
3. The UN Committee against Torture has confirmed that the imposition of a limitation period for torture is inconsistent with a State Party's obligations under the CAT. The UK is a State Party to the CAT. The effect of the presumption against prosecution is akin to a statute of limitations because the presumption will prevent prosecution of alleged offenders due to the passage of time.
4. Article 7 of the CAT obliges a State Party to prosecute individuals accused of torture or extradite the individual concerned. Decisions on prosecutions are to be made in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. However, it is likely that the Bill's high “exceptionality” threshold will result in cases not being prosecuted, despite the fact that the usual conditions for prosecution are met (Full Code Test).
5. Torture and other intentional ill treatment will also constitute a war crime if they are committed during armed conflict, or a crime against humanity if they are committed as part of a widespread

and systematic attack on a civilian population: see the 1949 Geneva Conventions and Articles 7 and 8 of the 1998 Rome Statute of the International Criminal Court (Rome Statute). Both war crimes and crimes against humanity are crimes that fall under the jurisdiction of the International Criminal Court (ICC). Article 29 of the Rome Statute, to which the UK is a State Party, states that crimes within the jurisdiction of the ICC shall not be subject to any statute of limitation. Any failure to prosecute a current or former member of the UK Armed Forces for such crimes would expose them to the risk of prosecution at the ICC, on the basis that the UK is “unwilling or unable genuinely to carry out the investigation or prosecution” (Article 17 of the Rome Statute).

Breach of obligations under Article 3 ECHR

In addition to potentially breaching of Article 7 of the CAT, the presumption against prosecution is incompatible with the UK’s obligations under the ECHR where it applies to offences involving torture or other ill-treatment because of the limitation period and an extremely high threshold for prosecution. Given the high threshold of exceptionality, there will be significant numbers of cases where the presumption is not displaced and a prosecution is discontinued or never initiated, despite the fact that the usual conditions for prosecution are met. Such systemic limitation of accountability undermines the effectiveness of the prohibition on torture or other ill-treatment, and reduces the deterrent power of the judicial system, to such an extent as to be incompatible with Article 3 ECHR. Furthermore, the presumption against prosecution would give rise to differential treatment constituting unjustified discrimination pursuant to Article 14 ECHR, read with Articles 2 and 3 ECHR.

A threat to the UK’s international standing

For centuries the United Kingdom led the way in the evolution of an absolute ban on torture. Torture was ruled out by the English common law, and proscribed by Magna Carta, as far back as the 13th century. The Crown practice of issuing torture warrants was finally ended in 1640. It was not until the 18th and 19th centuries that Continental Europe followed suit. Eventually the British stance prevailed in international law. The UK played a central role in the drafting of the ECHR, the International Covenant on Civil and Political Rights (ICCPR) and the United Nations CAT.

As a major military player on the global stage and permanent member of the UN Security Council, the UK plays an important role in the continued promotion of the international rules-based system that it helped to build. The Armed Forces have a responsibility for upholding this global leadership, including by setting an example in relation to accountability for any torture or other ill-treatment committed by our personnel on the battlefield. If Britain is to deliver on what Foreign Secretary Dominic Raab described as a foreign policy guided by “a clear moral compass”,¹ it must demonstrate in both deeds and words the importance to peace and security of justice for victims of international crimes and serious human rights abuses.

For further information, please contact:

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¹ See Speech of Rt Hon Dominic Raab MP, Foreign Secretary and First Secretary of State, Conservative Party Conference, 29 September 2019.